No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1943

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The District Court of the United States for the District of Maryland did not announce any opinion. The majority and dissenting opinions of the United States Circuit Court of Appeals for the Fourth Circuit (R. 10–22) are reported at 165 F. 2d 531.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 31, 1947 (R. 22). The petition for a writ of certiorari was filed on

March 3, 1948, and granted on March 29, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254).

QUESTION PRESENTED

Whether the Act of April 20, 1940, c. 117, 54 Stat. 143, to the extent that it amended Section 24 (1) (b) of the Judicial Code (28 U. S. C. 41 (1) (b)) so as to vest in the district courts of the United States jurisdiction of suits of a civil nature "between citizens of the District of Columbia, * * * and any State or Territory," was a constitutional enactment.[1]

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[1] On June 25, 1948, after certiorari had been granted here, the Act of April 20, 1940, and Section 24 (1) (b) of the Judicial Code were repealed (P. L. 773, 80th Cong., 2d sess., sec. 39) and the pertinent provisions of the Code revised to read as follows (*id.*, sec. 1, § 1332):

"§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States," as used in this section, includes the Territories and the District of Columbia."

The provisions of the replaced statute, however, continue to govern the rights and liabilities of the parties to this suit (*id.*, sec. 39), and, in any event, the new provisions pose the same constitutional questions as were raised by the 1940 Act.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Act of April 20, 1940, c. 117, 54 Stat. 143, reads as follows: [2]

> * * * That clause (b) of paragraph (1), section 24, of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 41; Supp. IV, title 28, sec. 41), be, and the same is hereby, amended to read as follows:
>
> "(b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."

(2) Article I, § 8, of the Constitution of the United States reads, in pertinent part, as follows:

The Congress shall have Power * * *

* * * * *

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[2] Section 24 (1) of the Judicial Code (28 U. S. C. (1940 ed.) 41 (1)), as amended by the 1940 statute, read, in pertinent part as follows:

"The district courts shall have original jurisdiction as follows:

"* * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controvery exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or * * * is between citizens of a State and foreign States, citizens or subjects. * * *"

As noted, *supra*, n. 1, the entire Section 24 (1) has been repealed, and the pertinent provision of the Code revised (P. L. 773, 80th Cong., 2d sess., secs. 39, 1 (1332)).

Cl. 9. To constitute Tribunals inferior to the supreme Court.

* * * * *

Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Cl. 18. To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(3) Article III, § 1 of the Constitution of the United States reads as follows:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article III, §2 of the Constitution of the United States reads, in pertinent part, as follows:

> Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

INTEREST OF THE UNITED STATES

The Government takes no position as to the merits of the claims asserted by petitioner and respondent against each other. Its sole interest is to support the validity of the 1940 statute.

STATEMENT

This action was commenced by petitioner in the District Court of the United States for the District of Maryland to recover $10,000, allegedly owing by respondent under the terms of an insurance contract. The complaint (R. 1–5) alleges

that petitioner is a corporation incorporated under the laws of the District of Columbia, and respondent a corporation of the State of Virginia, duly authorized and licensed to transact business in the State of Maryland (R. 1); that petitioner, as insurer, executed and delivered the insurance policy in question and filed a certificate thereof with the Interstate Commerce Commission, in compliance with Section II of the Interstate Commerce Act, as amended (R. 1); that an endorsement attached to the policy provided that respondent, the insured, reimburse petitioner for any payment made "on account of any accident, claim, or suit involving a breach of the terms of the policy" (R. 1-2); that petitioner was required to make certain payments because of such a breach by respondent (R. 2-4); and that respondent is liable for reimbursement of those sums to petitioner (R. 4). The jurisdiction of the District Court was invoked under 28 U. S. C. 41 (1) (R. 1).

On respondent's motion (R. 5), the District Court entered an order dismissing the complaint for lack of jurisdiction, the Act of April 20, 1940, being held "unconstitutional to the extent that it amends Section 41 (1) (b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States" (R. 6). The Circuit Court of Appeals affirmed, Judge Parker dissenting (R. 22; 165 F. 2d 531).

The majority opinion, holding the Act of April 20, 1940, unconstitutional, was grounded on the following rationale (R. 10–18): (1) Congress, in enacting the 1940 statute, must be deemed to have acted exclusively under Article III, § 2 of the Constitution. (2) The District of Columbia, however, is not a "State", within the meaning of that term as used in Article III. (3) Consequently, Congress, acting under that article, had no power to vest the district courts with jurisdiction over civil actions based on the fact that some of the litigants are citizens of the District. (4) Moreover, even if Congress were presumed to have acted under Article I, § 8, cl. 17 of the Constitution, the Act of April 20, 1940, is invalid. (5) This is so because the legislative power of Congress over the District of Columbia, though plenary and far-reaching, is to a very great extent territorially limited to the District. (6) Moreover, Congress cannot, under the guise of exercising that power, extend the jurisdiction of the district courts beyond the limits of judicial power defined by Article III.

The dissent of Judge Parker, on the contrary, although acquiescing in the majority holding that the District of Columbia is not a "State", within the meaning of Article III, urged that the 1940 Act was a valid exercise of the congressional power under Article I, § 8, cls. 17 and 18. Judge Parker's reasoning was as follows (R. 18–22): (1) Article III does not express the full authority

of Congress to create courts, and Congress, acting under Article I, § 8, cl. 17, may establish courts to hear any litigation to which a citizen of the District of Columbia is a party. (2) Such courts may be invested with the same judicial power as is vested in the federal courts created under Article III. (3) On like principle, Congress may vest, in Article III courts, the judicial power which it is authorized to confer on courts established under Article I, § 8, cl. 17. (4) The congressional power over the District of Columbia is not limited to the confines of the District. (5) Moreover, since Congress could authorize courts which it might create under that power to sit and their process to run anywhere in the country, there is no reason why it cannot combine the jurisdiction of such courts with that of the district courts already created under Article III. (6) Such a holding is in harmony with the primary duty of the Government to secure justice for its citizens by assuring them access to an impartial judiciary.

SUMMARY OF ARGUMENT

So far as it pertains to controversies involving citizens of the District of Columbia, the Act of April 20, 1940, may be sustained either (1) under the authority of Article III of the Constitution, or (2) as an appropriate exercise of the plenary power over the federal district conferred by Article I, § 8, cls. 17 and 18.

I

Article III of the Constitution provides that the judicial power of the United States shall be vested in the Supreme Court and in the lower federal courts and shall extend to controversies "between Citizens of different States * * * and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." There is no proof that the term "State," as there used, was intended to exclude the federal district. Nor is there any logic in reading the District of Columbia out of Article III. The liberality of constitutional construction would support a construction of the word "State" to include the District, and the term has been so read in connection with the application of treaties, statutes, and constitutional provisions other than that here involved.

There is nothing in the diversity clause of the judicial article which requires so strict a construction as to exclude the District from the category of "State." Nor does the ruling of this Court in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, require such an exclusion. Chief Justice Marshall made it clear that the *Hepburn* case involved merely the interpretation of the Judiciary Act of 1789. To be sure, he indicated that the word "State" had the same meaning in that statute as in the Constitution; but, in recognizing the discriminatory result of the decision with respect to citizens of

the District, he nevertheless suggested that "this is a subject for legislative, not for judicial consideration" (p. 453). The 1940 Act, now before the Court, explicitly included citizens of the District and was a belated response to Chief Justice Marshall's suggestion. The question of constitutionality is certainly not foreclosed by the *Hepburn* decision, and every consideration points to its validity.

II

There is a further reason for sustaining the Act of April 20, 1940. The congressional power over the District of Columbia and its citizens which is derived from Article I, § 8, cls. 17 and 18, of the Constitution is sweeping and inclusive in character. In the exercise of that power, Congress has the right to create inferior federal courts for the hearing and determination of controversies affecting citizens of the District. Since the power to legislate for the District clearly includes the power to make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts open to citizens of the States proper, it must be deemed to include also the power to enable the citizens of the District, in those cases in which the Constitution secures a like privilege for the citizens of the States proper, to resort to the federal courts already created in those States.

The plenary power of Congress over the District and its citizens is not confined to the boundaries of the District but may be exercised throughout the territorial limits of the United States. This principle, established early in the nation's history in *Cohens* v. *Virginia*, 6 Wheat. 264, has never been questioned, and the extraterritorial exercise of the plenary power over the District has been approved wherever deemed necessary to its proper execution.

The Act of April 20, 1940, cannot be condemned because it required a merger in the federal district courts of judicial functions incidental to the Article I powers with other judicial functions derived from Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the constitutional courts of the District of Columbia. There is no reason why it should not also be appropriate in the federal courts in the States proper. Whatever the merit of the rule prohibiting the vesting of legislative or administrative functions, as contrasted with judicial functions, in the "constitutional" courts of the nation, that rule plainly does not proscribe the merger of judicial functions in such courts, regardless of the constitutional genesis of such functions. Moreover, to hold such a merger of judicial functions improper would be to condemn the long exercised delegations of power to

the federal district courts to hear suits against the United States, a class of cases which, although judicial in character, has been held outside the pale of judicial power as defined in Article III.

Considerations of policy also support the validity of the Act of April 20, 1940, since it effects a salutary removal of an unfair discrimination against the citizens of the District of Columbia. In *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, Chief Justice Marshall regretfully remarked the discrimination which the Court's construction of the Judiciary Act of 1789 visited upon citizens of the District, and he invited legislative action to remove that discrimination. The Act of April 20, 1940, was Congress' belated response to that invitation. It is only fair that the citizens of the District of Columbia, which has grown into an urban metropolis of 861,000 people, should be afforded the same access to the impartial federal judiciary as is afforded not only to citizens of the States proper but to all aliens, including even those resident in the District of Columbia.

When the Constitution was drafted and when it was ratified, there was no federal district. Those who became citizens of the District thereafter created were at that time citizens of the States of Maryland and Virginia. As this Court has said, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was

intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States*, 289 U. S. 516, 540.

ARGUMENT

The sole issue on this review is the power of Congress to extend the diversity jurisdiction of the United States district courts to cases in which citizens of the District of Columbia are parties. It is our position that Congress has that power under the Constitution and that the Act of April 20, 1940, was a valid exercise of that power. In our view, therefore, the holding below is erroneous and should be set aside.

The Act of April 20, 1940, vested jurisdiction in the federal courts over suits "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."[3] Suits instituted by or against citizens of the District had been held outside the jurisdiction of the federal courts since the decision of this Court, in 1804, in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445. The 1940 Act was designed to end that discrimination. However, of the eleven district courts and two circuit courts of appeals which have had occasion to pass on its constitutionality, only

[3] As noted, *supra*, n. 1, the 1940 Act has now been replaced by sec. 1332 of the revised Judicial Code (P. L. 773, 80th Cong., 2d sess., sec. 1, § 1332).

three, all district courts, have upheld the Act; the remainder have rejected it.[4]

We submit that, so far as it pertains to controversies involving citizens of the District of Columbia, the Act of April 20, 1940, was valid on either of two grounds: *First,* as a proper exercise of the judicial power within Article III of the Constitution; and *second,* as an appropriate exercise of the plenary powers over the federal district delegated to Congress by Article I, § 8, cls. 17 and 18. On either theory, the policy considerations in support of constitutionality are persuasive. For these reasons, we urge that the Act of April 20, 1940, should be sustained as a valid congressional enactment.[5]

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[4] The Act has been upheld in *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.); *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif.), and *Duze* v. *Woolley*, 72 F. Supp. 422 (D. Hawaii).

It has been declared unconstitutional not only by the district court and the circuit court of appeals in the instant case, but also in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392 (C. C. A. 7), petition for writ of certiorari filed April 17, 1948, No. 43, this Term; *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa.); *Behlert* v. *James Foundation*, 60 F. Supp. 706 (S. D. N. Y.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Willis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); see, also, *Federal Deposit Insur. Corp.* v. *George Howard*, 55 F. Supp. 921 (W. D. Mo.), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8), certiorari denied, 329 U. S. 719.

[5] The legislative history of the 1940 statute is a meager one. Although the Committee on the Judiciary of the

I

The act of April 20, 1940, was authorized by Article III of the Constitution

Article I, § 8, cl. 9 of the Constitution empowers Congress "To constitute Tribunals inferior to the Supreme Court." Article III, § 1, provides that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, § 2, enumerates the classes of "Cases" and "Controversies" to which that judicial power "shall extend." Among these are controversies "between Citizens of different States * * * and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[6] The

House of Representatives, in recommending its enactment, fully reported the constitutional questions which it raised (H. Rep. No. 1756, 76th Cong., 3d sess.) and concluded that it was "a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories" (*id.*, p. 3), the constitutional questions were not considered at all in the report of the Senate committee (S. Rept. No. 1399, 76th Cong., 3d sess.), and there was no discussion of the measure whatever on the floor of the House or Senate. See 86 Cong. Reg. 2551, 2756, 3015, 3038, 4163, 4286, 4433, 4463, 4563, 4889.

[6] This is not the place to review the history of the judiciary clauses of the Constitution. For a recent summary account, see Frank, *Historical Bases of the Federal Judicial System*, (1948) 13 Law and Contemporary Problems 3. For particular references to the history of the diversity clause, see Frank, *op cit.*, 14–28; Friendly, *The Historic Basis of Diversity Jurisdiction*, (1928) 41 Harv. L. Rev. 483; Frankfurter,

question here is whether the term "State," as used in Article III, includes the District of Columbia. We submit that it does, and that it has been so treated in a variety of other situations.

Thus, when used in a treaty, the term "State" has been defined to include the District. In *Geofroy* v. *Riggs*, 133 U. S. 258, this Court held that a treaty which referred to "all the States of the Union" comprehended the District of Columbia, and that, under the treaty, French citizens were therefore qualified to inherit property from the District's citizens notwithstanding local laws to the contrary. Again, last Term, in *Hurd* v. *Hodge*, 334 U. S. 24, 31, the Court, in construing Section 1978 of the Revised Statutes, held "the District of Columbia is included within the phrase 'every State and Territory.'" See, also, *Talbott* v. *Silver Bow County Commissioners*, 139 U. S. 438, 444–445; *Downes* v. *Bidwell*, 182 U. S. 244, 258–263, 270; *id.* at 354–355 (Fuller, C. J., dissenting); *Grether* v. *Wright*, 75 Fed. 742, 753 (C. C. A. 6, per Taft, C. J.); *Watson* v. *Brooks*, 13 Fed. 540, 543–544 (C. C. D. Ore.); *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1, 9; *Callan* v. *Wilson*, 127

Distribution of Judicial Power Between United States and State Courts, (1928) 13 Corn L. Q. 499; Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, (1931) 79 U. of Pa. L. Rev. 869; Frankfurter and Landis, *The Business of the Supreme Court*, 8–11 (1927).

U. S. 540, 548–550; 6 Op. Atty. Gen. 302, 303-306; cf. *Andres* v. *United States*, 333 U. S. 740.

There is more reason for reading the term as inclusive of the federal district when construction of the Constitution is involved. For, constitutional language will generally be assigned a broader interpretation than that accorded "legislative codes which are subject to continuous revision with the changing course of events." *United States* v. *Classic*, 313 U. S. 299, 316. "Since the Constitution has a broader purpose than a statute and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute." Chafee, *Federal Interpleader Since the Act of 1936*, (1940) 49 Yale L. J. 377, 395. See, also, *Lamar* v. *United States*, 240 U. S. 60, 65; *Towne* v. *Eisner*, 245 U. S. 418, 425; *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66, 71–72; Holmes, J., dissenting in *Eisner* v. *Macomber*, 252 U. S. 189, 219; Brandeis, J., dissenting, *id.*, at 234.

Such an approach in construction is especially appropriate here. The term "State," as it is used in the Constitution, is a particularly ambiguous term. In *Texas* v. *White*, 7 Wall. 700, Chief Justice Chase, referring to that term, said (7 Wall. at 720):

> * * * The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found

> than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. * * *

The word "State," said the Court, "most frequently" denotes "the combined idea * * * of people, territory, and government" (7 Wall. at 721); that is, "the people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser or less definite relations * * *" (*id.*, at 720).

Clearly, the District of Columbia is a "State" within that definition. And merely because it may have been intended that it be excluded from the compass of the term within the constitutional provisions affecting national elections, there is no reason why the District should not be considered a "State" for the purposes of other provisions of the Constitution. It is not unusual for a word to be used with different meanings in the same act, and, likewise, in the Constitution, the same term has been accorded different constructions depending on the connections in which it has been employed. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433–434. "The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function." *Smiley* v. *Holm*, 285 U. S. 355, 365.

The fact is that the federal district has been treated as a "State" in connection with certain

constitutional provisions. Thus, in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, when the Court struck down an act of the Legislative Assembly of the District of Columbia requiring commercial agents soliciting the sale of goods to take out a license, as an unconstitutional regulation of commerce in so far as it applied to agents for persons doing business outside the District, it held, in effect, that commerce between the States proper and the District of Columbia constituted commerce "among the several States," within the meaning of Article I, section 8, cl. 3 of the Constitution. Miller, J., dissenting, 129 U. S. at 150–151. Cf. *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; *United States* v. *Whelpley*, 125 Fed. 616 (W. D. Va.). Again, in *Loughborough* v. *Blake*, 5 Wheat. 317, and *Embry* v. *Palmer*, 107 U. S. 3, constitutional provisions affecting "States" were, by extension, made applicable to the District.

There is certainly nothing in the diversity clause of Article III which dictates so strict a construction as to require exclusion of the District of Columbia from the category of "State." The clause has not otherwise been so narrowly applied. A corporation, though not a citizen under the privileges and immunities clause of the Constitution (*Paul* v. *Virginia*, 8 Wall. 168, 177–179; *Pembina Con. Silver Mfg. Co.* v. *Pennsylvania*, 125 U. S. 181 187–188), has been held a citizen

for purposes of diversity jurisdiction. *Louisville etc. Railroad Co.* v. *Letson*, 2 How. 497; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. Rev. 853, 1090–1225; cf. *Bank of the United States* v. *Deveaux*, 5 Cr. 61, 91. And this, despite a considerable opposition to such a construction (see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, (1923) 37 Harv. L. R. 49, 89–90; McGovney, *op. cit., passim*). The revision of the Judicial Code, which Congress has only just completed, views the term "State" in that clause with equal latitude, expressly defining it to include "the Territories and the District of Columbia." P. L. 773, 80th Cong., 2d sess., sec. 1, § 1332 (b). This legislative construction, it is submitted, is entitled to respectful consideration.

Nor is the decision in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, to the contrary. That case involved a construction of the provisions, not of the Constitution, but of the Judiciary Act of 1789, 1 Stat. 73.

In accordance with the authority delegated by Article III of the Constitution, the first Congress had promptly proceeded to the organization of a federal judiciary, and, on September 24, 1789, the Judiciary Act of 1789 was enacted. Among other things, Section 11 of the Act vested in the circuit courts, which it established, "cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in

equity, where the matter in dispute exceeds * * * the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. at 78. In the *Hepburn* case, plaintiffs were citizens and residents of the District of Columbia; defendant was a citizen and inhabitant of Virginia; and the jurisdiction of the federal circuit court was invoked on the basis of a diversity of citizenship of the parties. The question certified to this Court was whether the circuit court was required to dismiss the suit for want of jurisdiction. Chief Justice Marshall made it clear that the answer "depends on the act of congress describing the jurisdiction of that court," which "gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state" (2 Cr. at 452). In holding that the circuit court was without jurisdiction, he reached the conclusion that the District of Columbia was not a "State." And although he treated the statute as employing the term "State" in the same manner as used in the Constitution, he was nevertheless careful to point out (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the

> union, should be closed upon them. *But this is a subject for legislative, not for judicial consideration.* [Italics supplied.]

Strictly confined to its holding, the *Hepburn* case constitutes no more than a construction of Section 11 of the Judiciary Act of 1789. The remarks quoted above support such a narrow reading. And, though the decision has sometimes been taken, more broadly, as announcing a rule of constitutional law (see *New Orleans* v. *Winter*, 1 Wheat. 91, 94; *Hooe* v. *Jamieson*, 166 U. S. 395, 396–397; *Downes* v. *Bidwell*, 182 U. S. 244, 259; *O'Donoghue* v. *United States*, 289 U. S. 516, 543), such a reading would not only disregard Chief Justice Marshall's plain invitation to legislative action but also the well-accepted rule in favor of a liberal construction of constitutional language. See *supra*, p. 17.

Though the legislative history of the 1789 Act discloses no consideration of the particular problem involved in the instant case, one thing is clear: there was considerable opposition to the creation of inferior federal courts and, if they were to be established, to the grant of diversity jurisdiction to such courts. In consequence, before the Act was passed, the broad jurisdiction in diversity cases which Article III contemplated and which had been embodied in the draft bill introduced into the Senate (S. 1, 1st Cong., 1st sess.) had been substantially confined by amendment. See Warren, *New Light on the History of the Federal*

Judiciary Act of 1789; (1923) 37 Harv. L. R. 49, 79.

In such circumstances, it is difficult to justify the assumption which Chief Justice Marshall entertained without question in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, 452, that the term "State" was used in the Judiciary Act in the same sense as it had been employed in Article III of the Constitution. Irrespective of whether the *Hepburn* case be regarded as a correct decision with respect to the construction of the 1789 Act, it certainly should not be enlarged into a rule of constitutional law. And whatever interpretation may have been accorded the case by its contemporaries [8] and by the courts which have since fol-

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[7] Mr. Warren's remark is pertinent in this connection: "it may well be contended that had the Judges of the Supreme Court been familiar * * * with the history of the progress of the Bill in the Congress, several of the leading cases before that Court might have been decided differently." Warren, *op. cit.*, at 51. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 72–73.

[8] There is considerable doubt whether the lawyers of its day understood the case to enunciate constitutional doctrine, for, if so, one finds it difficult to explain why it elicited no comment in the fervent debate over the status of the District of Columbia which was waging in the Congress of the time. In the second session of the Eighth Congress, resolutions were introduced providing for the retrocession of all portions of the District, other than the City of Washington, to the States of Maryland and Virginia. These resolutions were heatedly debated on January 7–10, 1805. Though there was much comment about the discriminatory treatment meted out to the citizens of the District of Columbia by the then new Constitution, an examination of the

lowed it,[9] the decision has only recently been cited by this Court not as announcing constitutional doctrine, but, rather, as illustrative of a strict statutory construction. *Indianapolis* v. *Chase Nat. Bk.*, 314 U. S. 63, 76–77. Likewise, in *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, by explicitly reserving the question whether the words "Controversies * * * between citizens of different States" in Article III of the Constitution have a different meaning from that given by judicial construction to similar words in the

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reports on the debates discloses no mention of the *Hepburn* decision or its consequences. See 14 Ann. Cong. 874–981 *passim*.

[9] The ruling in *Hepburn & Dundas* v. *Ellzey* has been extended to proscribe suits in the federal courts by citizens of the territories, and, as so enlarged, consistently followed by this Court and the inferior federal courts. *New Orleans* v. *Winter*, 1 Wheat. 91; *Barney* v. *Baltimore City*, 6 Wall. 280; *Hooe* v. *Jamieson*, 166 U. S. 395; *In re Massachusetts*, 197 U. S. 482; *Watson* v. *Brooks*, 13 Fed. 540 (C. C. D. Ore.); *Darst* v. *City of Peoria*, 13 Fed. 561 (C. C. N. D. Ill.); *Land Company* v. *Elkins*, 20 Fed. 545 (C. C. S. D. N. Y.); *Seddon* v. *Virginia, etc., Co.*, 36 Fed. 6 (C. C. W. D. Va.); *Maxwell* v. *Federal Gold & Copper Co.*, 155 Fed. 110 (C. C. A. 8); *Mutual Life Ins. Co.* v. *Lott*, 275 Fed. 365 (S. D. Calif.); *Anderson* v. *U. S. Fidelity & Guaranty Co.*, 8 F. 2d 428 (S. D. Fla.); *Cissel* v. *McDonald*, Fed. Cas. No. 2,729 (C. C. S. D. N. Y.); *Vasse* v. *Miffin*, Fed. Cas. No. 16,895 (C. C. E. D. Penna.); *Westcott* v. *Fairfield*, Fed. Cas. No. 17,418 (C. C. D. N. J.); and see cases cited *supra*, p. 14, n. 4; see, also, *Downes* v. *Bidwell*, 182 U. S. 244, 259, 270, and cases cited in Rathvon and Keeffe, *Washingtonians and Roumanians*, (1948) 27 Nebraska L. R. 375, 377 (n. 14), 378 (n. 20).

Judiciary Act of 1789, the Court again, in effect, indicated the narrow confines of the *Hepburn* precedent. See Chafee, *The Federal Interpleader Act of 1936*, (1936) 45 Yale L. J. 963, 973; Chafee, *Federal Interpleader Since the Act of 1936*, (1940) 49 Yale L. J. 377, 395–398.

When the Constitution was written, ratified, and put into operation, the federal district which Article I, § 8, cl. 17, contemplated had not yet been established. It was not until 1790 that a "district of territory" composed of lands ceded by the States of Maryland and Virginia was accepted for the permanent seat of the Government of the United States; it was not until 1800 that the District became the seat of the national Government; and it was not until 1801 and 1802 that governmental organization was provided for its inhabitants. See Act of July 16, 1790, 1 Stat. 130; Act of February 27, 1801, 2 Stat. 103; Act of May 3, 1802, 2 Stat. 195. There is no proof available that the founders ever considered the question whether the federal courts should or should not be open to the citizens of the federal district on the same basis as to the citizens of the States proper. There is, therefore, no reason why the District of Columbia should be read out of Article III, but, to the contrary, as will be shown below, there are sound reasons of policy for not doing so. As has already been noted,

Hepburn & Dundas v. *Ellzey*, 2 Cr. 445, does not preclude, but, contrariwise, invites legislative action to eliminate the discrimination disclosed by that case. See *First Carolinas Joint Stock Land Bank* v. *Page*, 2 F. Supp. 529, 530 (M. D. N. C.). The terms of Article III, like all words in the Constitution, should be spared a reading of "stultifying narrowness" (*United States* v. *Classic*, 313 U. S. 299, 320) and should be construed to embrace within the judicial power over diverse citizenship cases those affecting citizens of the District of Columbia as well as of the States proper. The Act of April 20, 1940, was, therefore, an appropriate exercise of the judicial power defined in Article III and, consequently, a valid enactment of Congress.[19]

[19] It is of interest that in the only other federated nation in which a question analogous to that here in issue appears to have arisen, the courts have without difficulty accepted the federal district as a "State" on a par with the constituent members of the confederacy. In the Argentine, the Constitution provides for a dual system of courts similar to that in the United States and for a diversity jurisdiction in the federal courts in cases between inhabitants of different provinces and between Argentine citizens and foreigners. The interpretation of this section and of other provisions of the Argentine constitution has been much influenced by United States precedents. Nevertheless, the assimilation by statute of the inhabitants of the capital territory to inhabitants of a province for purposes of this diversity clause has not been questioned. *Demarchi* v. *Olmos*, 29 Fallos de la S. C. 363; see Riesenfeld and Hazard, *Federal Courts in Foreign Systems*, (1948) 13 Law and Contemporary Problems 29, 44–45, n. 130.

II

The Act of April 20, 1940, was a valid exercise of the plenary power of Congress to legislate for the District

There is a further reason for sustaining the Act of April 20, 1940. As the Committee on the Judiciary of the House of Representatives stated when it recommended enactment of the statute, the Act "is a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories." (H. Rep. No. 1756, 76th Cong., 3d sess., p. 3). Article I, § 8, cls. 17 and 18 afford ample authority for enactment of the Act of April 20, 1940, so far as the District of Columbia is concerned.

Article I, § 8, cl. 17 empowers Congress "To exercise exclusive legislation in all Cases whatsoever" over the federal district. Clause 18 authorizes Congress "To make all laws which shall be necessary and proper for carrying [that power] into Execution." The sweeping and inclusive character of this congressional power over the District of Columbia and its citizens has often been proclaimed. See, for example, *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 619; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434–435; *Shoemaker* v. *United States*, 147 U. S. 282, 300; *O'Donoghue* v. *United States*, 289 U. S. 516, 539; *Capital Traction Co.*

v. *Hof*, 174 U. S. 1, 5; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147; *Downes* v. *Bidwell*, 182 U. S. 244, 289–290 (White, J., concurring); *Neild* v. *District of Columbia*, 110 F. 2d 246, 249–251 (App. D. C.). Equally well established is the right of Congress, in exercise of that power, to create inferior federal courts for the hearing and determination of controversies affecting the District's citizens. *O'Donoghue* v. *United States*, *supra*, at 545–548; see, also, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442–443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693.

For, Article III "does not express the full authority of Congress to create courts." *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. In addition to the power derived from that article, from which stems the authority to establish the so-called "constitutional" courts, Congress may create so-called "legislative" or "statutory" courts, to aid it in carrying out the numerous other functions entrusted to it. *American Insurance Co.* v. *Canter*, 1 Pet. 511. Resort to such "legislative" courts has been frequent. Thus, the territorial courts, are creatures not of Article III but rather of the power, that granted by Article IV, § 3, cl. 2, to make "all needful Rules and Regulations respecting the Territory" of the United States. *American Insurance Co.* v. *Canter*, *supra*; *McAllister* v. *United States*, 141

U. S. 174. The Court of Customs Appeals was established as an exercise of the powers to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution, provided by Article I, § 8, cls. 1 and 18. *Ex parte Bakelite Corporation*, 279 U. S. 438. The Court of Claims is a tribunal created in aid of the congressional authority granted by Article I, § 8, cl. 1 to pay the debts of the United States. *Williams* v. *United States*, 289 U. S. 553. Similarly, the courts of the District of Columbia, though in part "constitutional" in character, are also an expression of powers vested in Congress by Article I of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516. See, also, Katz, *Federal Legislative Courts*, (1930) 43 Harv. Law Rev. 894."

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[11] In light of this well-established congressional authority in addition to that derived from Article III, Chief Justice Stone's statement in *Lockerty* v. *Phillips*, 319 U. S. 182, 187, that "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution," can be explained only as intended to refer to the "constitutional" courts, or, in the alternative (and what seems less likely), to renew an earlier suggestion of the Court, that the enumeration of classes of litigation in Article III is by no means exclusive and that the judicial power of the United States is far broader than that article of the Constitution suggests. See *Kansas* v. *Colorado*, 206 U. S. 46, 82–83; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. R. 853, 854–855; Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. R. 894, 918.

Thus, the power to legislate for the District includes the power to make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts open to citizens of the States proper. *O'Donoghue* v. *United States,* 289 U. S. 516, 540–541. On like principle, it would seem that the power to legislate for the District must be deemed to include the power to enable its citizens, in those cases in which the Constitution secures a like privilege to the citizens of the States, to resort to the federal courts already created in the States proper. The grant of diversity jurisdiction to the federal courts was designed to provide a forum free of the supposed prejudices of the local courts against aliens and citizens of other, "foreign" States. *Serè* v. *Pitot,* 6 Cr. 332, 337–338; *Bank of the United States* v. *Deveaux,* 5 Cr. 61; 87; *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 111–112; *The Federalist,* No. 80; 2 Story, *Commentaries on the Constitution* (5th ed., 1891), §§ 1690–1692; Friendly, *The Historic Basis of Diversity Jurisdiction,* (1928) 41 Harv. L. Rev. 483.[12] To the extent such prejudices are still ex-

[12] There is considerable question whether the diversity clause was grounded on a real experience of prejudice. A recent study of the available historical materials suggests that the diversity jurisdiction of the federal courts may fairly be said to be the product of three factors, the relative weight of which cannot now be assessed: (1) the desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common sense

tant and continue to justify the access afforded "foreign" citizens to the federal courts, they impair the interests of District of Columbia litigants as well as those domiciled in the States proper. There was no more reason, in 1800, to have feared prejudice against Maryland citizens in the Virginia courts than to have feared prejudice there against residents of Georgetown and Washington, who only the year before had been citizens of Maryland. There is no more reason now to expect prejudice against Maryland citizens than against those of the District.[13]

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anticipation; (2) the desire to permit commercial, manufacturing, and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interests; and (3) the desire to achieve the more efficient administration of justice for the classes thus benefited. Frank, *Historical Bases of the Federal Judicial System*, (1948) 13 Law and Contemporary Problems 3, 28.

[13] The justification for and the wisdom of extending the federal judicial power to diversity cases are not in issue here, and it would serve no useful purpose to reiterate the arguments for or against such extension. All aspects of that debate seem to have been covered in the struggle over the bills introduced by Senator Norris, Representative LaGuardia, and others, in the Seventy-Second Congress, to abolish or limit the federal diversity jurisdiction (S. 939, H. R. 11508, S. 937, H. R. 10594, H. R. 4526, all 72d Cong., 1st sess.). Presenting the argument for curtailment or abolition are: Sen. Rep. No. 530, 72d Cong., 1st sess.; Sen. Rep. 701, 72d Cong., 1st sess.; Frankfurter, *Distribution of Judicial Power between United States and State Courts*, (1928) 13 Corn. L. Q. 499; Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, (1931) 79 U. Pa. L. R. 1097;

The majority of the court below, however, rejects the rationale founded on the Article I powers over the District for two reasons: *First,* it says that although the congressional power over the District of Columbia is plenary, it is limited territorially to the District and cannot be exercised beyond its confines. *Second,* it says that although *O'Donoghue* v. *United States,* 289 U. S. 516, sanctions the merger of non-Article III judicial functions with Article III judicial functions in the "constitutional" courts of the District of Columbia, such a merger is prohibited in the "constitutional" courts which Congress has created in the States proper. We submit that neither of these reasons is sound or affords any justification for striking down the Act of April 20, 1940.

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and Clark, *Diversity of Citizenship Jurisdiction in the Federal Courts,* (1933) 19 A. B. A. J. 499. Presenting the argument for retention of diversity jurisdiction are: Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction,* (1931) 79 U. Pa. L. R. 869; *Limiting Jurisdiction of Federal Courts*—Comment by Members of Chicago University Law School Faculty, (1932) 31 Mich. L. R. 59; Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* (1932) 18 A. B. A. J. 433; Howland, *Shall Federal Jurisdiction of Controversies between Citizens of Different States be Preserved?,* (1932) 18 A. B. A. J. 499; Yntema, *The Jurisdiction of Federal Courts in Controversies between Citizens of Different States,* (1933) 19 A. B. A. J. 71, 149, 265.

Our point is that if diversity jurisdiction is to be maintained at all, the logic for its application to the citizens of the District of Columbia is as cogent as that for its retention for the citizens of the States proper and for aliens.

A. The plenary power of Congress over the District of Columbia and its citizens may be exercised beyond the confines of the District

The Court's opinion in *Cohens* v. *Virginia*, 6 Wheat. 264, supplies a complete answer to the suggestion that the congressional power over the District must be restricted to its limited boundaries. In that case, early in the nation's history, this Court announced the broad sweep of the plenary power of Congress over the federal district. If it desired to do so, said the Court, Congress, pursuant to that power, might legislate to bind not only the citizens of the District but the citizens of the States proper as well, and to supersede state laws, which, though contrary, would have to bow to the superior acts of Congress. The plenary power over the federal district, Chief Justice Marshall declared, "like all others which are specified, is conferred on congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character, can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone, that the constitution confers on them this power of exclusive legislation" (6 Wheat., at 424). And, again, "The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States" (*ibid.*). Pointing out the similarity between the power to legislate within the District of Columbia

and that to legislate with respect to forts, arsenals, dock-yards, etc., the Court noted the extensive scope of such authority (6 Wheat., at 428–429):

> * * * the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all

those incidental powers which are necessary to its complete and effectual execution.

Though the opinion in the *Cohens* case was hotly assailed for sanctioning an appeal to this Court from a state tribunal, it apparently bred no hostility so far as it related to the ambit of the plenary power over the District. See Dodd, *Chief Justice Marshall and Virginia, 1813–1821,* (1907) 12 Amer. Hist. Rev. 776, 781–786. In that respect, it has never seriously been questioned, and this Court has had no reluctance in approving the "extraterritorial" exercise of the power wherever deemed necessary to its proper execution. Thus, in *Embry* v. *Palmer,* 107 U. S. 3, an act of Congress construed to require state courts to give full faith and credit to the judgments of the courts of the District of Columbia was approved as, at least in part, a constitutional exercise of the plenary power vested in Congress over the federal district. And this, although such judgments are not within the reach of the full faith and credit clause and, therefore, like those of foreign countries, would have been, absent the act of Congress, extraterritorially enforceable apart from that clause only to the extent the law of the forum might permit. Cf. *McElmoyle* v. *Cohen,* 13 Pet. 312, 324–325; *Atchison, T. & S. F. Ry.* v. *Sowers,* 213 U. S. 55, 69. See, also, *Picquet* v. *Swan,* Fed. Cas. No. 11,134, p. 611 (C. C. D. Mass., per Story, J.); *Grether*

v. *Wright*, 75 Fed. 742, 756, 757 (C. C. A. 6, per Taft, C. J.), quoted with approval in *O'Donoghue* v. *United States*, 289 U. S. 516, 539–540.

There is, we submit, no justification for more narrowly confining Congress—geographically speaking—when it exercises its plenary power over the District of Columbia and its citizens than when it performs any of the other powers entrusted to it by Article I of the Constitution. As Judge Parker pointed out in his dissent below (R. 21):

> * * * Certainly, if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts (*In re Ross*, 140 U. S. 453) or the United States Court for China (*Ex parte Bakelite Corp.*, 279 U. S. 438, 451), there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District * * *.

Similarly, there is no reason why the broad scope which the federal courts give to the territorial jurisdiction which they derive from the bankruptcy clause of the Constitution, when read in conjunction with the judiciary article (*Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438, 442;

Toland v. *Sprague*, 12 Pet. 300; Mussman and Riesenfeld, *Jurisdiction in Bankruptcy*, (1948) 13 Law and Contemporary Problems 88, 89), should be narrowed in the case of jurisdiction derived from the other clause of Article I with respect to governance of the federal district.

As the United States Court of Appeals for the District aptly put it in *Neild* v. *District of Columbia*, 110 F. 2d 246, 250-251:

> * * * Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. * * *

B. Congress may invest the federal district courts in the States proper with judicial functions other than those enumerated in Article III

There is no greater force to the contention that the Act of April 20, 1940, was invalid because it required a merger in the federal district courts

of judicial functions incidental to the exercise of Article I powers with judicial powers defined in Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the "constitutional" courts of the District of Columbia. There is no reason why it should not also be appropriate in the federal courts in the States proper.

True, there are expressions in certain opinions of this Court which, read out of context, appear to prohibit such a consolidation of functions. Thus, in *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, the Court, parenthetically referring to the "constitutional" courts, notes that "They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise." Again, in *O'Donoghue* v. *United States*, 289 U. S. 516, 546, the Court says:

> * * * Does the judicial power conferred extend to the cases enumerated in that article [Art. III]? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere * * *.

We suggest, however, that such statements were intended only to reiterate the familiar rule that *legislative* or *administrative* functions, normally vested in the legislative or executive branches of the Government, as contrasted with *judicial* functions, normally the business of the courts, can be vested in "legislative" or "statutory" courts but never in "constitutional" courts (other than those in the District of Columbia). See *Williams* v. *United States*, 289 U. S. 553, 565–567. Whatever the merit of that rule, it obviously does not proscribe the merger of certain *judicial* functions born of sections of the Constitution other than Article III, with other functions, likewise judicial in character, born of Article III.

Nor is there any justification for so extending the rule. The bar against assignment of administrative and other nonjudicial functions to the federal judiciary had its origin in the doctrine of separation of powers; the vesting of administrative functions in the judiciary, it was feared, would endanger the independence of the courts and would threaten an encroachment on their prerogatives by the legislative and the executive. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40. Such dangers, however, are not presented by a merger of judicial functions, whatever their genesis. The doctrine of separation of powers, though it does find support in the tripartite division of governmental functions into

legislative, executive, and judicial, in the first three articles of the Constitution, neither stems from such a mechanical arrangement nor from Article III alone. The doctrine is founded on the sound policy of separating three essentially different powers of government and making each independent of the others. But where judicial powers alone are being exercised, there is no policy which requires that they be separated because of their varied origin. So long as such powers are judicial in character, even though some may not be derived from Article III, their exercise by the federal courts in no wise impairs the independence of the judiciary.

This is implicit in decisions such as *James* v. *Appel,* 192 U. S. 129, where the Court upheld a territorial statute in face of an attack on it as an usurpation of judicial power and assumed the pertinence of the doctrine of separation of powers even though a territorial court, which derived its judicial power from Article IV, not Article III (*American Insurance Co.* v. *Canter,* 1 Pet. 511), was involved. Again, the doctrine of separation of powers has been considered relevant to naturalization proceedings, although these need not be submitted to the judiciary for determination (*Johannessen* v. *United States,* 225 U. S. 227; Rutledge, J., concurring in *Schneiderman* v. *United States,* 320 U. S. 118, 165) and are thus

not derived from the grant in Article III (*Williams* v. *United States*, 289 U. S. 553, 580).[14]

However important it may be to ascertain the source of judicial power when the tenure of the judges who exercise it is in issue (cf. *O'Donoghue* v. *United States*, 289 U. S. 516, with *Williams* v. *United States*, 289 U. S. 553), such an inquiry is irrelevant, so long as judicial functions are involved, when the question at issue is the power of the federal courts to exercise such functions. See *Comment* (The Distinction Between Legislative and Constitutional Courts), (1933) 43 Yale L. J. 316, 323. The decision of this Court in *Pope* v. *United States*, 323 U. S. 1, makes this quite clear. There, a special act of Congress conferring jurisdiction on the Court of Claims to hear, determine, and render judgment on certain specific claims was held invocative of the "judicial power" of that court, notwithstanding the fact that the statute, as construed by that tribunal, directed it to enter judgment for the claimant in an amount determinable by simple computation on claims which had once been passed

[14] That the doctrine of the separation of powers does not preclude the merger of non-Article III with Article III judicial functions becomes clear too when one recalls that the requirement that judicial acts remain free from legislative interference is not peculiar to our Constitution, but rests on traditions which Anglo-American law has found to be inherent in our system of government. See Mr. Chief Justice Taney's draft opinion in *Gordon* v. *United States*, 117 U. S. 697, 705–706.

on pursuant to its general jurisdiction and determined for the Government. 100 C. Cls. 375. This Court said (323 U. S. 13):

> * * * notwithstanding the retention of * * * administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held, by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. III, § 2, cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims * * * and of the courts of the District of Columbia * * * [citing cases].

And, again (323 U. S. at 13–14):

> * * * although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here. The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases. Its possession of non-judicial functions by direction of Congress presents no more obstacle to appellate review of its judicial determinations by this Court, than does the performance of like functions by the courts of the District of Columbia or by

> state courts whose exercise of judicial power, in the cases specified in Article III, § 2, Cl. 1, of the Constitution, is reviewable here by virtue of Cl. 2 of § 2. * * *

Such a ready acceptance by this Court of jurisdiction in cases involving the exercise of judicial power derived from sources other than Article III of the Constitution deprives the non-merger argument of any force whatever. If this Court, under the Constitution, has the authority to determine such cases on review, the federal district courts have the capacity to hear and decide them in the first instance. See Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. R. 894, 918, 919; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. R. 853, 854–855; Note, (1934) 34 Col. L. R. 344, 353–354.

Finally, to hold such a merger of judicial functions improper would be to condemn the long-existing grants of jurisdiction to the federal district courts to hear suits against the United States. See, *e. g.*, P. L. 773, 80th Cong., 2d sess., sec. 1, §§ 1346, 2671–2680 (embodying, in revised form, the provisions of the Tucker Act and the Federal Tort Claims Act). For, in *Williams* v. *United States*, 289 U. S. 553, this Court held the adjudication of claims against the United States, although a judicial function, outside the pale of "judicial power" as defined in Article III; such judicial functions, it was held, were derived rather from the power to pay the debts of the

United States granted to Congress by Article I of the Constitution (289 U. S. at 572–581). These non-Article III suits against the Government have, nevertheless, long been entertained by the federal district courts of the States proper, and that with the approval of this Court. See, for example, *United States* v. *Sherwood*, 312 U. S. 584; *United States* v. *Pfitsch*, 256 U. S. 547; *Pope* v. *United States*, 323 U. S. 1, 14; see, also, Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. Rev. 894, 917–919; *Note*, (1934) 34 Col. L. R. 344, 355, n. 66, 67. In such circumstances, it is inconceivable that the exercise of jurisdiction over other similarly non-Article III judicial functions, the adjudication of controversies between District of Columbia citizens and citizens of the states proper, should now be disapproved. Certainly, the decision of such cases—the present suit, for example—involves the exercise of judicial power and is, therefore, susceptible of judicial cognizance by "constitutional" courts. *Gordon* v. *United States*, 2 Wall. 561; *Williams* v. *United States*, 289 U. S. 553, 563–564; 580–581; *Hayburn's Case*, 2 Dall. 409.[15]

[15] There is one further argument which conceivably may be advanced in support of the Act of April 20, 1940. That statute was, of course, one of the laws of the United States. And, consequently, it might be urged that a suit brought in reliance on its provisions is a case "arising under * * * the laws of the United States," within the definition of judicial power contained in Article III. Such an argument would

The Act of April 20, 1940, then, as we have demonstrated, is supportable as a legal enactment on either of two alternative theories: *first*, as an appropriate extension of the judicial power of the United States defined in Article III of the Constitution; *second*, as a valid exercise of the plenary power of Congress over the District of Columbia and its citizens. The logic of either of these lines of argument is real and irrefutable, and both are supported by weighty considerations of policy. We refer not merely to the usual presumption of constitutionality, but more particularly to the fact that the Act of April 20, 1940, was designed to remove a discrimination to which the citizens of the District of Columbia had been subjected, without any apparent reason

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find considerable support in *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, where the United States brought suit in the Court of Claims, pursuant to a special jurisdictional act, to ascertain whether an award which had been procured by the mining company had been based on fraud. This Court unanimously rejected an attack on the judgment of the Court of Claims grounded on the theory that there was no "case or controversy" under Article III, § 2, on which jurisdiction could be based, holding that a case did exist under the jurisdictional act. 175 U. S. at 455. But cf. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 482–485. See, also, *Southern Kansas Ry. Co.* v. *Briscoe*, 144 U. S. 133; *Osborn* v. *United States*, 9 Wheat. 738; Note, *Section 301 (a) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, (1948) 57 Yale L. J. 630, 632–637; Rathvon and Keeffe, *Washingtonians and Rumanians*, (1948) 27 Nebraska L. R. 375, 388, n. 69; cf. Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. Rev. 894, 902–903.

in national policy, for one hundred and thirty-five years.

Chief Justice Marshall, when announcing the Court's opinion in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, regretfully remarked the discrimination which the Court's construction of the Judiciary Act of 1789 visited upon the citizens of the District of Columbia, and he invited legislative action to remove that discrimination (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The Act of April 20, 1940, was Congress' belated response to that invitation to legislative action proffered by the Court. See H. Rep. No. 1756, 76th Cong., 3d sess., p. 3:

> * * * It should be borne in mind that the citizens of the District of Columbia and of the Territories are citizens of the United States. They are subject to the burdens and obligations of such citizenship just as are the citizens of the 48 States. Simple justice requires that they should share the rights and privileges of such citizenship insofar as Congress has authority to confer it upon them. This is the real intent of the Constitution.

As we have already noted, *supra*, pp. 25–26, 30–31, there is no apparent reason for discriminating against the District's citizens, and a study of the historical materials discloses no possible rationalization for such discrimination. If the federal courts are to be open on the basis of diversity of citizenship to the citizens of the States proper and to aliens, even when resident in the District of Columbia, it seems no more than fair that similar access should be permitted the citizens of the District.

The District of Columbia has grown from a partially rural community of 14,093 persons in 1800 to an exclusively urban metropolis with a population of 663,091 in 1940; and of these residents in 1940, 652,490 were citizens of the United States.[16]

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[16] These are the official census statistics. U. S. Department of Commerce, *Sixteenth Census of United States*, 1940, Population, vol. II (1), pp. 955, 960. It is estimated that the population had risen to 861,000 by 1947 (U. S. Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P–25, No. 12, p. 7). Unofficial sources indicate a substantially smaller population in 1800 than that indicated by the official census—somewhere between 3,000 to 6,000—for that part of the then District which still remains under federal sovereignty. See Letter of Thomas Jefferson to Joel Barlow, May 3, 1802, X *Writings of Jefferson* (Mem. ed. 1903), p. 321; 3 Beveridge, *Life of Marshall* (1919), p. 8.

There are no reliable statistics as to the number of permanent domiciliaries in the District. We are informed, however, that *The Washington Post*, in connection with a recent survey of opinion in the District on local self-government, polling adults in 400 families selected as a "random area sample of households" on a basis similar to that used by the Census Bureau and the Bureau of Labor Statistics, found that the

Its citizens trade and travel throughout the United States and every day engage in numerous transactions with citizens of the States proper. As Judge Parker noted below (R. 21–22):

> The right to invoke the jurisdiction of the only sovereignty to which they owe allegiance and to which they can look for protection has become an increasingly important one and has at length been recognized by Congress in the passage of legislation, which opens the federal courts to them on the same condition that these courts are open to other citizens of the Republic.

It is only meet that they too, as well as the citizens of the States proper, should be permitted to sue in the federal courts.

As already noted, when the Constitution was drafted and when it was ratified, there was no federal district. The citizens who subsequently,

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following percentages of the sample had resided in the District of Columbia for these periods:

Percent of sample	*No of years in District*
2	less than 1 year.
14	1 year but less than 5 years.
20	5 years but less than 10 years.
43	more than 10 years.
21	native born.

(See *The Washington Post*, Sunday, February 1, 1948, sec. II, p. 1. The Office of the Collector of Taxes for the District of Columbia advises us that approximately 99,100 taxable income tax returns were filed by individual taxpayers for the year 1947, of which approximately half were joint returns; and that about 3,550 returns were filed by corporations for that year.

in 1801, became citizens of the newly created District of Columbia[17] were at that time citizens of the States of Maryland and Virginia. Only later were the lands upon which these citizens resided ceded to the National Government. As this Court has said in another but closely related connection, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States,* 289 U. S. 516, 540; see, also, *Downes* v. *Bidwell,* 182 U. S. 244, 260–261; cf. *Callan* v. *Wilson,* 127 U. S. 540, 550.

The holding, in 1805, that the District's citizens were barred from federal courts open not only to their Maryland and Virginia neighbors, but to all aliens, even those residing in the District of Columbia, was an "extraordinary" decision. *Hepburn & Dundas* v. *Ellzey,* 2 Cr. 445, 453. To hold, as the court below does, that the legislative action invited by this Court in the *Hepburn* case

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[17] For a narrative account of the organization of the District, see *Morris* v. *United States,* 174 U. S. 196. See, also Naylor, *The District of Columbia, Its Legal Status,* (1932) 21 Geo. L. J. 21; Caemmerer, *A Manual on the Origin and Development of Washington* (1939); Sen. Doc. No. 178, 75th Cong., 3d sess., pp. 1–33 *passim.*

is futile to eliminate the discrimination seems unjustifiable.[18]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Act of April 20, 1940, should be held constitutional and that the judgment below should accordingly be reversed.

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[18] The considerations of policy in support of the Act of April 20, 1940, are amply developed in the dissenting opinion of Circuit Judge Parker in the court below and that of Circuit Judge Evans in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392 (C. C. A. 7), petition for certiorari pending, No. 43, this Term. See, also, McKenna, *Diversity of Citizenship Clause Extended*, (1940) 29 Geo. L. J. 193; Dykes and Keeffe, *The 1940 Amendment to the Diversity of Citizenship Clause*, (1946) 21 Tulane L. R. 171; Rathvon and Keeffe, *Washingtonians and Rotmanians* (1948) 27 Nebraska L. R. 375; (1943) 5 Louisiana L. R. 478; (1943) 11 George Washington L. R. 258; (1942) 21 Texas L. R. 83; (1946) 46 Col. L. R. 125; Note (1947), 60 Harv. L. R. 424, 426-428; (1948) 61 Harv. L. R. 885; (1948) 46 Mich. L. R. 557. But see, Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction*, (1948) 15 D. C. Bar Assn. J. 55; *Note* (1946), 55 Yale L. J. 600.

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